Docket No.: 320529154US
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Scott E. Lipsky et al.

Application No.: 10/675,925 | Confirmation No.: 2365

Filed: September 29, 2003 | Art Unit: 2144

For: METHOD AND SYSTEM FOR DISTRIBUTING IMAGES TO CLIENT SYSTEMS | Examiner: Thanh T. Nguyen

APPEAL BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

As required under § 41.37(a), this brief is filed within two months of the Notice of Appeal filed in this case on May 5, 2010, and is in furtherance of said Notice of Appeal.

The fees required under 37 C.F.R. § 41.20(b)(2) are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains items under the following headings as required by 37 C.F.R. § 41.37 and MPEP § 1205.2. The complete Table of Contents follows.

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I. REAL PARTY IN INTEREST

The rights of the inventors in this application have been assigned to Eqapez Foundation, L.L.C.

II. RELATED APPEALS AND INTERFERENCES

Neither Appellants, Appellants' legal representative, nor the above-identified Assignee are aware of other appeals or interferences that are related to, will directly affect or be directly affected by or have a bearing on the Board's decision in the present appeal.

III. STATUS OF CLAIMS

Claims 1-57 have been presented. Claims 6, 9-36, and 42 have been canceled. Claims 1-5, 7, 8, 37-41, and 43-57 are therefore presently pending.

Claims 1-5, 7, 8, 37-41, and 43-57 stand rejected and are the subject of the present appeal. The text of these claims is set forth below in the Claims Appendix.

IV. STATUS OF AMENDMENTS

The claim amendments presented in the Response After Final filed on April 5, 2010 were not entered. Accordingly, the pending claims are the claims presented in the Response to Non-Final Office Action filed on October 27, 2009.

V. SUMMARY OF CLAIMED SUBJECT MATTER

A. Overview of Appellants' Technology

The rejected independent claims are generally directed to distributing images to client systems. In some embodiments, a distribution system is connected to client systems via a communications link, such as the Internet. The distribution system tracks communications received from client systems via the communications link. These communications comprise heartbeat communications, HTTP requests, and/or other communications. In some embodiments, a communication received from a client system includes a time associated with the communication, such as a time stamp.

In some embodiments, the distribution system distributes an image or a package of images to a client system via the communications link or via a mechanism other than the communications link, such as a DVD or CD-ROM, depending on whether the client system has recently communicated with the distribution system via the communications link. In some embodiments, for an image or package of images that is to be distributed to the client system, the distribution system determines whether a time associated with a most recently received communication is within a certain time period. If so, the distribution system sends the image or package of images to the client system via the communications link; otherwise, the distribution system sends the image or package of images to the client system via a mechanism other than the communications link.

In some embodiments, the distribution system records an indication of a heartbeat communication received from a client system. For an image that is to be sent to the client system, the distribution system determines whether the image is to be sent to the client system via the Internet or via some other mechanism based on the heartbeat communications received from the client system, as indicated by the recorded indications of the received heartbeat communications. The distribution system sends the image to the client system via the Internet or via some other mechanism based on the determination.

B. Independent Claims on Appeal

Each independent claim being appealed is paraphrased below, with citations to the corresponding portions of the specification and drawings as required by 37 C.F.R. § 41.37(c)(1)(v). These citations are provided in order to illustrate specific examples and embodiments of the recited claim language, and are not intended to limit the claims.

1. Claim 1

Claim 1 is directed to a method of using a distribution system for distributing images to client systems (*see, e.g.,* Specification ¶¶ [0001], [0011], [0014]) by tracking communications received at the distribution system from a client system via a communications link, wherein a communication received from the client system includes a time associated with the communication (*see, e.g.,* Specification ¶¶ [0011], [0012], [0014], [0017]; Figure 1, communications link 105; Figure 2, client store 203); and for an image that is to be distributed by the distribution system to a client system, determining whether a time associated with a most recently received communication from the client system is within a certain time period (*see, e.g.,* Specification ¶ [0012]); if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, communication interface 201, distribution component 207); and if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, distribution component 207).

2. Claim 37

Claim 37 is directed to an image distribution computing system having a processor and memory (*see, e.g.,* Specification ¶¶ [0001], [0011], [0014], [0015]; Figure

2), comprising a component that receives via a communications link communications from client systems (*see, e.g.,* Specification ¶¶ [0011], [0012], [0014], [0016], [0017]; Figure 1, communications link 105; Figure 2, communication interface 201); a component that provides packages of images to be distributed to client systems (*see, e.g.,* Specification ¶¶ [0011], [0012], [0014], [0016]; Figure 2, image packaging component 206); a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, distribution component 207); and a component that directs the distribution of a package of images to a client system in accordance with the determination (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, distribution component 207), wherein the components are implemented as instructions stored in the memory for execution by the processor (*see, e.g.,* Specification ¶ [0015]).

3. Claim 46

Claim 46 is directed to a method in a computer system for distribution of images to a client system (*see, e.g.,* Specification ¶¶ [0001], [0011], [0014]) by receiving via the Internet heartbeat communications from a client system, the heartbeat communications being HTTP requests (*see, e.g.,* Specification ¶¶ [0011], [0012], [0014], [0016], [0017]; Figure 1, communications link 105; Figure 2, communication interface 201); recording an indication of receipt of the heartbeat communications from the client system (*see, e.g.,* Specification ¶¶ [0012], [0014], [0016]; Figure 2, client store 203); determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications (*see, e.g.,* Specification ¶ [0012]); and sending the image to the client system via the Internet or via some other mechanism based on the determination (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, communication interface 201, distribution component 207).

4. Claim 55

Claim 55 is directed to a computer-readable medium having stored thereon computer-executable instructions that, if executed by a computing system, cause the computing system to perform a method (*see, e.g.,* Specification ¶¶ [0001], [0011], [0014], [0015]) comprising tracking communications received at the computing system from a client system via a communications link, wherein a communication received from the client system includes a time associated with the communication (*see, e.g.,* Specification ¶¶ [0011], [0012], [0014], [0017]; Figure 1, communications link 105; Figure 2, client store 203); and for an image that is to be distributed by the computing system to a client system, determining whether a time associated with a most recently received communication from the client system is within a certain time period (*see, e.g.,* Specification ¶ [0012]); if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, communication interface 201, distribution component 207); and if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link (*see, e.g.,* Specification ¶¶ [0012], [0016]; Figure 2, distribution component 207).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A. The Examiner's Rejections

1. The Examiner rejected claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over U.S. Patent Application Publication No. 2003/0110503 by Perkes ("Perkes"), U.S. Patent Application Publication No. 2002/0056123 by Liwerant et al. ("Liwerant"), and U.S. Patent Application Publication No. 2002-0152432 by Fleming ("Fleming").

2. The Examiner rejected claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and U.S. Patent No. 6,617,879 to Chung ("Chung").

3. The Examiner rejected claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and U.S. Patent No. 6,843,010 to Christian et al. ("Christian et al.").[1]

B. The Issues on Appeal

1. Is the Examiner's rejection of claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Fleming proper?

2. Is the Examiner's rejection of claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Chung proper?

3. Is the Examiner's rejection of claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and Christian proper?

VII. ARGUMENT

A. Legal Requirements

1. Legal Standard for Obviousness

Claims 1-5, 7, 8, 37-41, and 43-57 stand rejected under 35 U.S.C. § 103(a), which provides:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the

[1] The Examiner also rejected claims 6 and 42 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Christian. However, these claims were canceled in the Response to Non-Final Office Action filed on October 27, 2009. Accordingly, Appellants have not addressed this rejection herein.

> prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

To properly reject claims as obvious, "the examiner bears the initial burden of presenting a *prima facie* case of obviousness." (*In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d (BNA) 1955, 1956 (Fed. Cir. 1993).) To present a *prima facie* case of obviousness, the Examiner must show that "there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue." (*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).) Relevant considerations may include "interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art." (*Id.*) The Examiner's analysis "should be made explicit." (*Id.*) "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal standard of obviousness." (*Id.* (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).)

Under these standards, Appellants' invention would not have been obvious. The Examiner has not identified references that disclose or suggest all the elements of pending claims 1-5, 7, 8, 37-41, and 43-57. Furthermore, the Examiner has not identified a rational apparent reason to combine the references in the manner recited in each of Appellants' claims. Therefore, the rejection of claims 1-5, 7, 8, 37-41, and 43-57 should be reversed.

B. Overview of the Applied References

1. Perkes

Perkes describes a system for presenting media on demand. (Perkes, Abstract.) A viewer may view and/or schedule the delivery of broadcast segments. When a

broadcaster is ready to deliver a broadcast segment to the viewer, Perkes determines the on line or off line status of the viewer's computer. If the viewer's computer is on line, the viewer is provided with information about the broadcast segment, and is given the option to accept or refuse download of the segment. If the viewer accepts, the segment is downloaded to the viewer's computer via the Internet. If the viewer's computer is off line, information about the broadcast segment is saved for subsequent notification when the viewer is on line. (Perkes, ¶¶ [0078], [0125].)

2. Liwerant

Liwerant describes a system for sharing a video segment over a computer network. (Liwerant, Abstract.) Liwerant may present a user with a web page form to collect information from the user in connection with a video segment, including payment information, specifications such as resolution and/or image quality, and an additional copy of the files, such as a copy recorded on CD-ROM and sent to the user via the postal service. (Liwerant, ¶ [0052].)

3. Fleming

Fleming describes a method for detecting process and network failures in a distributed system. To detect a network or process failure, Fleming determines whether a communication is received within a threshold or time limit. If not, the network or process is suspected of failing, and a corrective action (e.g., eliminating and/or replacing a failed process) can be taken. (Fleming, ¶¶ [0018], [0020], [0025].)

4. Christian

Christian describes a management system for multiple network transceivers. (Christian, Abstract.) Using a reporting functionality, a user can review information associated with the network transceivers including site name/ID, connectivity status, and a date and time stamp of the last communication with the transceiver. (Christian, 10:11-30.)

5. Chung

Chung describes a communication bus for interconnecting ports of a multi-port bridge of a local area network. (Chung, Abstract.) Chung maintains a look-up table correlating network nodes to the appropriate ports of the multi-port bridge. When nodes are added or removed from the local area network, the look-up table is updated accordingly. (Chung, 26:65-27:13.)

C. Discussion of the Issues

1. The Rejection of Claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Fleming is Improper

a. The Examiner has failed to show how the combination of Perkes, Liwerant, and Fleming discloses or suggests all of the recited features of claims 1-5, 8, 37-41, 43-49, and 51-57, and has thereby failed to establish a *prima facie* case of obviousness

In the Final Office Action dated February 5, 2010, the Examiner rejected claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Fleming. However, the Examiner failed to show how Perkes, Liwerant, and Fleming together disclose or suggest all of the recited features of these claims, and thereby failed to establish a *prima facie* case of obviousness. In particular, the Examiner failed to show how Perkes, Liwerant, and Fleming together disclose or suggest:

(1) "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55;

(2) "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55;

(3) "a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37; and

(4) "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46.

i. Independent Claims 1 and 55

Independent claims 1 and 55 recite "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link."

The Examiner cites Perkes and Fleming as together disclosing this recited feature. In particular, it is the Examiner's position that Perkes discloses "if it is determined that the time associated with the most recently received communication from the client system, sending the image to the client system via the communications link," and that Fleming discloses "determining that the time associated with the most recently received communication is not within certain time period [sic]." (Final Office Action, Feb. 5, 2010, pp. 3, 4.) The Examiner is mistaken. Perkes and Fleming do not together disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55.

The Examiner's characterization of Perkes as disclosing "if it is determined that the time associated with the most recently received communication from the client system," Fleming as disclosing "determining that the time associated with the most

recently received communication is not within certain time period [sic]," and Perkes as disclosing "sending the image to the client system via the communications link" does not satisfy the Examiner's burden. The Examiner has not identified a reference or combination of references that discloses or suggests the feature "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55. The Examiner's characterization of Perkes as disclosing "if it is determined that the time associated with the most recently received communication from the client system" does not make sense. This is an incomplete statement of Appellants' claim feature "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period" (emphasis added). Without the last clause of this claim feature, or any clause at all specifying a particular determination, the "determination" cited by the Examiner is no determination at all, and is merely an empty statement.

Furthermore, the Examiner cites Fleming as disclosing "determining that the time associated with the most recently received communication is not within certain time period [sic]" (emphasis added), rather than "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period" (emphasis added), as recited in independent claims 1 and 55. In fact, the Examiner did not cite any reference or combination of references as disclosing or suggesting "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period" (emphasis added), as recited. Nor did the Examiner take the position that this recited feature would have been obvious to one of ordinary skill in the art at the time of Appellants' invention. Because the Examiner has not cited a reference as disclosing or suggesting each and every feature of Appellants' claims or indicated that the claim features would have been obvious to one of ordinary skill in the art, the Examiner has

not established a *prima facie* case of obviousness under 35 U.S.C. § 103(a). (*KSR,* 550 U.S. 398.)

Nevertheless, Perkes and Fleming do not together disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55.

The Examiner cites Perkes at paragraphs [0078] and [0079] as disclosing "if it is determined that the time associated with the most recently received communication from the client system, sending the image to the client system via the communications link." In particular, it is the Examiner's position that Perkes discloses "if on line, the viewer is provided certain information about the broadcast segment (digital photos, video or MP3)." (*Id.* at 3.)

The cited portions of Perkes describe a Master Agent that determines the on line or off line status of a viewer's computer. If the viewer's computer is on line, Perkes provides the viewer with information associated with a broadcast segment and allows the viewer to download the segment via the Internet. The broadcast segment may include digital photos, video, or MP3s. However, Perkes does not disclose or suggest how the on line or off line status of a viewer's computer is determined, and in particular does not disclose a determination that is made based on "the time associated with the most recently received communication from the client system," as recited in independent claims 1 and 55. Moreover, Perkes does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link" as recited.

Nor does Perkes inherently disclose "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link."

A prior art reference only inherently discloses a claim feature if the system described in the reference *necessarily* functions in accordance with the claim feature. (*In re King*, 801 F.2d 1324, 1326 (Fed. Cir. 1986).) Perkes may reasonably determine the on line or off line status of a viewer's computer without considering a communication from a viewer's computer at all. For example, Perkes' Master Agent may simply initiate a communication to the viewer's computer, without determining whether a communication has previously been received from the viewer's computer.

Nor does Fleming disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," whether alone or in combination with Perkes. The Examiner cites Fleming at Figure 1 and paragraphs [0018], [0020], [0023], [0025], and [0027]-[0028] as disclosing "determining that the time associated with the most recently received communication is not within certain time period [sic]." In particular, it is the Examiner's position that Fleming "transmit[s] heartbeats on communications path 110-160 to detect a process failure (period of time)." (Final Office Action, Feb. 5, 2010, p. 4.)

The cited portions of Fleming describe an administrative function performed by a distributed system to detect failure of one or more networks or processes. If a failed network or process is detected, a corrective action (e.g., eliminating and/or replacing a failed process) can be taken. To detect a network failure, Fleming compares the difference between a period of time for process A to receive a heartbeat from process B on a first network, and a period of time for process A to receive a heartbeat from process B on a second network. If the difference exceeds a network failure threshold, the second network is suspected of failing. To detect a process failure, Fleming determines whether a heartbeat is received from any process in a system prior to expiration of a process failure time limit. For example, Fleming measures the difference between a time a last heartbeat was received from a process and a later instance in

time. For any process from which a heartbeat is not received, the process is suspected of failing.

As discussed above, the Examiner cites Fleming as disclosing "determining that the time associated with the most recently received communication is not within certain time period [sic]" (emphasis added), rather than "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period" (emphasis added), as recited in independent claims 1 and 55. Even if Fleming were to disclose determining whether a received communication is within a certain time period, as recited, Fleming does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited. Unlike Appellants' techniques, Fleming does not disclose taking any action if a heartbeat is received from a process prior to expiration of the process failure time limit.

For at least these reasons, Perkes and Fleming fail to disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55, whether alone or in combination.

Independent claims 1 and 55 also recite "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link."

The Examiner cites Perkes, Fleming, and Liwerant as together disclosing this recited feature. In particular, it is the Examiner's position that Perkes discloses "if determined that the time associated with the most recently received communication from the client system, sending has communicated with the distribute system via the

communications link [sic]," that Fleming discloses "determining that time associated with the most recently received communication from the client is not within certain time period [sic]," and that Liwerant discloses "sending the image to the client system via a mechanism other that [sic] the communications link." (Final Office Action, Feb. 5, 2010, pp. 3-4.) The Examiner is mistaken. Perkes, Fleming, and Liwerant do not together disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55.

The Examiner's characterization of Perkes as disclosing "if determined that the time associated with the most recently received communication from the client system," Fleming as disclosing "determining that time associated with the most recently received communication from the client is not within certain time period [sic]," Perkes as disclosing "sending has communicated with the distribute system via the communications link [sic]," and Liwerant as disclosing "sending the image to the client system via a mechanism other that [sic] the communications link" does not satisfy the Examiner's burden. The Examiner has not cited a reference or combination of references that discloses or suggests "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55. As discussed above, the Examiner's characterization of Perkes as disclosing "if determined that the time associated with the most recently received communication from the client system," does not make sense. This is an incomplete statement of Appellants' claim feature "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period" (emphasis added). Without the last clause of this claim feature, or any clause at all specifying a particular determination, the "determination" cited by the Examiner is no determination at all, and is merely an empty statement.

Moreover, the Examiner's characterization of Perkes as disclosing "sending has communicated with the distribute system via the communications link [sic]" is nonsensical. Appellants' claims certainly do not recite this feature, nor do Appellants understand what feature the Examiner is referring to in Perkes. The Examiner's characterization of Perkes as disclosing "if the viewer is offline, the Intent to the broadcast notification [sic]" is also unclear. Appellants believe that the Examiner intended to indicate that Perkes discloses if the viewer is off line, the Intent to Broadcast Notification is stored for subsequent notification to the viewer when the viewer is online, as described in the cited portion of Perkes, as discussed below.

Nevertheless, Perkes, Fleming, and Liwerant do not together disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55.

The Examiner cites Perkes at paragraph [0125] as disclosing "if determined that the time associated with the most recently received communication from the client system, sending has communicated with the distribute system via the communications link [sic]." In particular, it is the Examiner's position that Perkes discloses "if the viewer is offline, the Intent to the broadcast notification [sic]." (*Id.* at 3.)

The cited portion of Perkes describes that its Master Agent sends an "Intent to Broadcast Notification" to a viewer's computer. If the viewer is on line, the viewer is notified of the Intent to Broadcast. If the viewer is off line, the Master Agent stores the Intent to Broadcast Notification for subsequent notification to the viewer when the viewer is on line. In either case, when a viewer is on line, the viewer is given the option to view, store, or refuse the broadcast. However, as discussed above, Perkes does not disclose or suggest <u>how</u> the on line or off line status of a viewer's computer is determined, and in particular does not disclose a determination that is made based on

"the time associated with the most recently received communication from the client system," as recited. Moreover, Perkes does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link" as recited. Perkes either provides a broadcast segment to the viewer via the Internet or not at all.

Nor does Fleming disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," whether alone or in combination with Perkes. The Examiner cites Fleming at Figure 1 and paragraphs [0018], [0020], [0023], [0025], and [0027]-[0028] as disclosing "determining that the time associated with the most recently received communication is not within certain time period [sic]." In particular, it is the Examiner's position that Fleming "transmit[s] heartbeats on communications path 110-160 to detect a process failure (period of time)." (Final Office Action, Feb. 5, 2010, p. 4.)

As discussed above, the cited portions of Fleming describe an administrative function performed by a distributed system to detect failure of one or more networks or processes. If a failed network or process is detected, a corrective action (e.g., eliminating and/or replacing a failed process) can be taken. To detect a network failure, Fleming compares the difference between a period of time for process A to receive a heartbeat from process B on a first network, and a period of time for process A to receive a heartbeat from process B on a second network. If the difference exceeds a network failure threshold, the second network is suspected of failing. To detect a process failure, Fleming determines whether a heartbeat is received from any process in a system prior to expiration of a process failure time limit. For example, Fleming measures the difference between a time a last heartbeat was received from a process

and a later instance in time. For any process from which a heartbeat is not received, the process is suspected of failing.

However, while Fleming describes determining that a received communication is not within a certain time period, Fleming does not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited. Unlike Appellants' techniques, Fleming simply eliminates or replaces a failed process based on the determination that a received communication is not within a certain time period.

Nor does Liwerant disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," whether alone or in combination with Perkes and Fleming. The Examiner cites Liwerant at paragraph [0052] as disclosing "sending the image to the client system via a mechanism other that [sic] the communications link." In particular, it is the Examiner's position that Liwerant discloses "resolution and/or image quality desired by the user of sender A's computer 10, and the provision of the file in some additional option form, such as recorded on CD-ROM and sent to the user of sender's computer 10 by postal service [sic]." (Final Office Action, Feb. 5, 2010, pp. 4-5.)

The cited portion of Liwerant describes an HTML form or message into which a user can submit information, such as the resolution and/or image quality desired and optional services desired, such as receiving files on a CD-ROM sent via the postal service. However, Liwerant does not disclose or suggest sending content on a CD-ROM via the postal service "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period," as recited in independent claims 1 and 55.

For at least these reasons, Perkes, Fleming, and Liwerant do not disclose or suggest "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55, whether alone or in combination.

For at least these reasons, independent claims 1 and 55 were improperly rejected under 35 U.S.C. § 103(a), as were their dependent claims 2-5, 8, 52, 56, and 57.

ii. Independent Claim 37

Independent claim 37 recites:

> a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link.

The Examiner rejects this claim using the same rationale used to reject independent claims 1 and 55, as discussed above. (Final Office Action, Feb. 5, 2010, pp. 3-5.) The Examiner is mistaken. Perkes, Fleming, and Liwerant do not together disclose or suggest:

> a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link,

as recited in independent claim 37.

As discussed above, the cited portions of Perkes describe that when a broadcast segment is to be downloaded to a viewer, Perkes determines the on line or off line status of a viewer's computer. If the viewer's computer is on line, Perkes provides the viewer with information associated with the broadcast segment and allows the viewer to download the segment. If the viewer's computer is off line, Perkes stores a notification about the broadcast segment until the viewer is subsequently on line. (Perkes, ¶¶ [0078], [0125].) However, simply determining the on line or off line status of a viewer's computer does not disclose or suggest any indication of "when the client system last communicated with the image distribution computing system via the communications link," as recited. Nor does Perkes disclose or suggest "a component that determines ... whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited. Perkes either sends a broadcast segment to a viewer via the Internet or not at all.

Nor does Fleming disclose or suggest:

> a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link,

as recited in independent claim 37, whether alone or in combination with Perkes. As discussed above, the cited portions of Fleming describe an administrative function performed by a distributed system to detect failure of one or more networks or processes. If a failed network or process is detected, a corrective action (e.g., eliminating and/or replacing a failed process) can be taken. To detect a network failure, Fleming compares the difference between a period of time for process A to receive a heartbeat from process B on a first network, and a period of time for process A to

receive a heartbeat from process B on a second network. If the difference exceeds a network failure threshold, the second network is suspected of failing. To detect a process failure, Fleming determines whether a heartbeat is received from any process in a system prior to expiration of a process failure time limit. For example, Fleming measures the difference between a time a last heartbeat was received from a process and a later instance in time. For any process from which a heartbeat is not received, the process is suspected of failing.

While Fleming describes determining that a received communication is not within a certain time period, Fleming does not disclose or suggest "a component that determines ... whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37. Unlike Appellants' techniques, Fleming simply eliminates or replaces a failed process based on the determination that a received communication is not within a certain time period.

Nor does Liwerant disclose or suggest:

> a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link,

as recited in independent claim 37, whether alone or in combination with Perkes and Fleming.

As discussed above, the cited portion of Liwerant describes that a user may indicate that a copy of content is to be recorded on a CD-ROM and sent to the user via the postal service. (Liwerant, ¶ [0052.] However, Liwerant does not disclose or suggest

any indication of "when a client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37. Nor does Liwerant disclose "a component that determines ... whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited.

Moreover, the Examiner's citation to Perkes as disclosing sending content via the Internet and to Liwerant as sending content on a CD-ROM via the postal service does not satisfy the Examiner's burden. In particular, the Examiner has not cited a reference or combination of references that discloses or suggests "a component that determines ... whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37. At most, Perkes and Liwerant each disclose sending content via a single mechanism – the Internet or the postal service, respectively. Neither of these references, whether alone or in combination, discloses or suggests determining which of multiple delivery mechanisms is to be used to send content, let alone basing such a determination on when the client system last communicated with the image distribution computing system via the communications link.

For at least these reasons, Perkes, Fleming, and Liwerant do not disclose or suggest:

> a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link,

as recited in independent claim 37, whether alone or in combination.

For at least these reasons, independent claim 37 was improperly rejected under 35 U.S.C. § 103(a), as were its dependent claims 38-39, 41, 43-45, and 53.

iii. Independent Claim 46

Independent claim 46 recites "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications."

The Examiner cites Perkes, Liwerant, and Fleming as together disclosing this recited feature. In particular, it is the Examiner's position that Perkes discloses "determining whether an image is to be sent to a client system via the Internet based on communications received from the client system as indicated by the recorded indications of the receipt of communications system," that Liwerant discloses "sending the image to the client system via a mechanism other that [sic] the communications link," and that Fleming discloses heartbeat communications. (Final Office Action, Feb. 5, 2010, pp. 16-18.) The Examiner is mistaken. Perkes, Liwerant, and Fleming do not together disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46.

The Examiner's characterization of Perkes as disclosing "determining whether an image is to be sent to a client system via the Internet," Liwerant as disclosing "sending the image to the client system via a mechanism other that [sic] the communications link," to Perkes as disclosing "based on communications received from the client system as indicated by the recorded indications of the receipt of communications system," and

Fleming as disclosing heartbeat communications does not satisfy the Examiner's burden. The Examiner has not cited a reference or combination of references that discloses or suggests "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46.

The Examiner cites Perkes at paragraph [0078] as disclosing "determining whether an image is to be sent to a client system via the Internet based on communications received from the client system as indicated by the recorded indications of the receipt of communications system." In particular, it is the Examiner's position that Perkes discloses "if the viewer is on line, the viewer is provided certain information about the broadcast segment (digital photos, video or MP3), and if the viewer offline, broadcast Notification is stored for future notification." (*Id.* at 16-17.)

As discussed above, the cited portions of Perkes describe that when a broadcast segment is to be downloaded to a viewer, Perkes determines the on line or off line status of a viewer's computer. If the viewer's computer is on line, Perkes provides the viewer with information associated with the broadcast segment and allows the viewer to download the segment. If the viewer's computer is off line, Perkes stores a notification about the broadcast segment until the viewer is subsequently on line. (Perkes, ¶¶ [0078], [0125].) However, as discussed above, Perkes does not disclose or suggest how the on line or off line status of a viewer's computer is determined, and in particular does not disclose a determination that is made "based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46. Nor does Perkes disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of

heartbeat communications," as recited. Perkes either sends the broadcast segment to the viewer via the Internet or not at all.

Nor does Liwerant disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46, whether alone or in combination with Perkes. The Examiner cites Liwerant at paragraph [0052] as disclosing "sending the image to the client system via a mechanism other that [sic] the communications link." In particular, it is the Examiner's position that Liwerant discloses "resolution and/or image quality desired by the user of sender A's computer 10, and the provision of the JTle [sic] in some additional option form, such as recorded on CD-ROM and sent to the user of sender's computer 10 by postal service [sic]." (Final Office Action, Feb. 5, 2010, p. 17.)

As discussed above, the cited portion of Liwerant describes that a user may indicate that a copy of content is to be recorded on a CD-ROM and sent to the user via the postal service. (Liwerant, ¶ [0052.] However, Liwerant does not disclose or suggest any indication of "heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46. Nor does Liwerant disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited.

Moreover, the Examiner's citation to Perkes as disclosing sending content via the Internet and to Liwerant as sending content on a CD-ROM via the postal service does not satisfy the Examiner's burden. In particular, the Examiner has not cited a reference or combination of references that discloses or suggests "determining whether an image

is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46. At most, Perkes and Liwerant each disclose sending content via a single mechanism – the Internet or the postal service, respectively. Neither of these references, whether alone or in combination, discloses or suggests determining which of multiple delivery mechanisms is to be used to send content, let alone basing such a determination on heartbeat communications received from a client system as indicated by recorded indications.

Nor does Fleming disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46, whether alone or in combination with Perkes and Liwerant. The Examiner cites Fleming at Figure 1 and paragraphs [0018], [0020], [0023], [0025], and [0027]-[0028] as disclosing heartbeat communications. In particular, it is the Examiner's position that Fleming discloses "transmit[ting] heartbeats on communication path 110-160 to detect a process failure." (Final Office Action, Feb. 5, 2010, pp. 17-18.)

As discussed above, the cited portions of Fleming describe an administrative function performed by a distributed system to detect failure of one or more networks or processes. If a failed network or process is detected, a corrective action (e.g., eliminating and/or replacing a failed process) can be taken. To detect a network failure, Fleming compares the difference between a period of time for process A to receive a heartbeat from process B on a first network, and a period of time for process A to receive a heartbeat from process B on a second network. If the difference exceeds a network failure threshold, the second network is suspected of failing. To detect a process failure, Fleming determines whether a heartbeat is received from any process in a system prior to expiration of a process failure time limit. For example, Fleming

measures the difference between a time a last heartbeat was received from a process and a later instance in time. For any process from which a heartbeat is not received, the process is suspected of failing.

While Fleming describes receiving heartbeats from a process, Fleming does not disclose or suggest "recorded indications of the receipt of heartbeat communications," as recited in independent claim 46. Nor does Fleming disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited. Fleming either eliminates or replaces a failed process or takes no action at all.

For at least these reasons, Perkes, Liwerant, and Fleming do not disclose or suggest "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46, whether alone or in combination.

For at least these reasons, independent claim 46 was improperly rejected under 35 U.S.C. § 103(a), as were its dependent claims 47-49 and 54.

b. The combination of Perkes, Liwerant, and Fleming fails to disclose or suggest all of the recited features of claims 1-5, 8, 37-41, 43-49, and 51-57, and is therefore incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that Perkes, Liwerant, and Fleming together disclose or suggest all of the recited features of claims 1-5, 8, 37-41, 43-49, and 51-57, the applied references together do not in fact disclose or suggest all of the recited features of these claims. In particular, Appellants can find nothing in Perkes, Liwerant, and Fleming, whether alone or in combination, that discloses or suggests:

(1) "if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link," as recited in independent claims 1 and 55;

(2) "if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link," as recited in independent claims 1 and 55;

(3) "a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link," as recited in independent claim 37; and

(4) "determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications," as recited in independent claim 46.

Accordingly, the combination of Perkes, Liwerant, and Fleming is incapable of supporting any proper rejection of claims 1-5, 8, 37-41, 43-49, and 51-57 under 35 U.S.C. § 103(a).

c. The Examiner has failed to show a rational apparent reason for combining Perkes, Liwerant, and Fleming, and has thereby failed to establish a *prima facie* case of obviousness

The Examiner has not articulated a rational apparent reason to combine Perkes, Liwerant, and Fleming to arrive at any of Appellants' claims, and has thereby failed to establish a *prima facie* case of obviousness. In determining whether there is an apparent reason to combine applied references, the Examiner's analysis must be explicit and "cannot be sustained by mere conclusory statements." (*KSR,* 550 U.S. at

418 (citing *In re Kahn*, 441 F.3d at 988)). The Examiner must articulate "reasoning with some rational underpinning to support the legal standard of obviousness." (*Id.*)

The Examiner states that one of ordinary skill in the art would have been motivated to combine Perkes and Fleming "for the purpose of providing for detecting process and network failures in a distributed system the user a convenient, optimal viewing quality, enhanced security [sic]." (Final Office Action, Feb. 5, 2010, pp. 4, 21-22.) However, the first half of this statement is merely a recitation of the object of an individual reference (*see* Fleming, ¶ [0005]), rather than an articulated reason with rational underpinnings of why it would have been obvious to one skilled in the art to combine the applied references to arrive at any of Appellants' claims. The second half of this statement is merely a recitation of the object of another individual reference (*see* Liwerant, ¶ [0139]) that, while subsequently combined with Perkes and Fleming, does not provide an articulated reason with rational underpinnings for combining Perkes and Fleming. Moreover, Appellants do not understand how the Examiner's stated motivation applies to Appellants' invention at all. For example, Appellants' claims do not recite "detecting process and network failures in a distributed system" or "a convenient, optimal viewing quality, enhanced security [sic]," as stated by the Examiner.

The Examiner also states that one of ordinary skill in the art would have been motivated to combine Perkes and Liwerant "for the purpose of providing for the user a convenient, optimal viewing quality, enhanced security [sic]." However, this statement is merely a recitation of an object of an individual reference (*see* Liwerant, ¶ [0139]), rather than an articulated reason with rational underpinnings of why it would have been obvious to one skilled in the art to combine the applied references to arrive at any of Appellants' claims. Moreover, Appellants do not understand how the Examiner's stated motivation applies to Appellants' invention at all. For example, as discussed above, Appellants' claims do not recite "a convenient, optimal viewing quality, enhanced security [sic]," as stated by the Examiner.

Furthermore, these disjointed statements do not offer a single, coherent rationale as to why one would combine all three applied references in a manner that would arrive at Appellants' claims. For at least these reasons, the Examiner has failed to establish a *prima facie* case of obviousness.

d. There is no apparent reason to combine Perkes, Liwerant, and Fleming, and therefore their combination is incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that there is a rational apparent reason to combine Perkes, Liwerant, and Fleming to arrive at any of Appellants' claims, after careful review of the applied references, Appellants are not aware of such an apparent reason.

2. The Rejection of Claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Chung is Improper

a. The Examiner has failed to show how the combination of Perkes, Liwerant, and Chung discloses or suggests all of the recited features of claim 7, and has thereby failed to establish a *prima facie* case of obviousness

In the Final Office Action dated February 5, 2010, the Examiner rejected dependent claim 7 under 35 U.S.C. § 103(a) over Perkes, Liwerant, and Chung. For at least the reason that dependent claim 7 contains all of the features and elements of independent claim 1, the Examiner has failed to show that the applied references together disclose or suggest all of the recited features of dependent claim 7, and has thereby failed to establish a *prima facie* case of obviousness. Accordingly, dependent claim 7 was improperly rejected under 35 U.S.C. § 103(a).

b. The combination of Perkes, Liwerant, and Chung fails to disclose or suggest all of the recited features of claim 7, and is therefore incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that Perkes, Liwerant, and Chung together disclose or suggest all of the recited features of dependent claim 7, for at least the reason that dependent claim 7 includes all of the features and elements of independent claim 1, the applied references together do not in fact disclose or suggest all of the recited features of dependent claim 7. Accordingly, the combination of Perkes, Liwerant, and Chung is incapable of supporting any proper rejection of dependent claim 7 under 35 U.S.C. § 103(a).

c. The Examiner has failed to show a rational apparent reason for combining Perkes, Liwerant, and Chung, and has thereby failed to establish a *prima facie* case of obviousness

The Examiner has not articulated a rational apparent reason to combine Perkes, Liwerant, and Chung to arrive at any of Appellants' claims, and has thereby failed to establish a *prima facie* case of obviousness. (*KSR,* 550 U.S. at 418 (citing *In re Kahn*, 441 F.3d at 988).) The Examiner states that it would have been obvious to one of ordinary skill in the art at the time of Appellants' invention to combine Chung and Perkes "for the purpose of increasing the data packet handling capacity in a multi-port bridge for a local area network." (Final Office Action, Feb. 5, 2010, p. 13.) However, this statement is merely a recitation of an object of an individual reference (*see* Chung, 2:18-21), rather than an articulated reason with rational underpinnings of why it would have been obvious to one skilled in the art to combine the applied references to arrive at any of Appellants' claims. Moreover, Appellants do not understand how the Examiner's stated motivation applies to Appellants' invention at all. For example, Appellants' claims do not recite "increasing the data packet handling capacity in a multi-port bridge for a local area network," as stated by the Examiner.

The Examiner also states that it would have been obvious to one of ordinary skill in the art at the time of Appellants' invention to combine Liwerant and Perkes "for the purpose of providing for the user a convenient, an optimal viewing quality, enhanced security." (*Id.* at 14.) However, this statement is merely a recitation of an object of an individual reference (*see* Liwerant, ¶ [0139]), rather than an articulated reason with rational underpinnings of why it would have been obvious to one skilled in the art to combine the applied references to arrive at any of Appellants' claims. Moreover, Appellants do not understand how the Examiner's stated motivation applies to Appellants' invention at all. For example, Appellants' claims do not recite "a convenient, optimal viewing quality, enhanced security [sic]," as stated by the Examiner.

Furthermore, these disjointed statements do not offer a single, coherent rationale as to why one would combine all three applied references in a manner that would arrive at Appellants' claims. For at least these reasons, the Examiner has failed to establish a *prima facie* case of obviousness.

d. There is no apparent reason to combine Perkes, Liwerant, and Chung, and therefore their combination is incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that there is a rational apparent reason to combine Perkes, Liwerant, and Chung to arrive at any of Appellants' claims, after careful review of the applied references, Appellants are not aware of such an apparent reason.

3. The Rejection of Claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and Christian is Improper

a. The Examiner has failed to show how the combination of Perkes, Liwerant, Fleming, and Christian discloses or suggests all of the recited features of claim 50, and has thereby failed to establish a *prima facie* case of obviousness

In the Final Office Action dated February 5, 2010, the Examiner rejected dependent claim 50 under 35 U.S.C. § 103(a) over Perkes, Liwerant, Fleming, and Christian. For at least the reason that dependent claim 50 contains all of the features and elements of independent claim 46, the Examiner has failed to show that the applied references together disclose or suggest all of the recited features of dependent claim 50, and has thereby failed to establish a *prima facie* case of obviousness. Accordingly, dependent claim 50 was improperly rejected under 35 U.S.C. § 103(a).

b. The combination of Perkes, Liwerant, Fleming, and Christian fails to disclose or suggest all of the recited features of claim 50, and is therefore incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that Perkes, Liwerant, Fleming, and Christian together disclose or suggest all of the recited features of dependent claim 50, for at least the reason that dependent claim 50 includes all of the features and elements of independent claim 46, the applied references together do not in fact disclose or suggest all of the recited features of dependent claim 50. Accordingly, the combination of Perkes, Liwerant, Fleming, and Christian is incapable of supporting any proper rejection of dependent claim 50 under 35 U.S.C. § 103(a).

c. The Examiner has failed to show a rational apparent reason for combining Perkes, Liwerant, Fleming, and Christian, and has thereby failed to establish a *prima facie* case of obviousness

The Examiner has not articulated a rational apparent reason to combine Perkes, Liwerant, Fleming, and Christian to arrive at any of Appellants' claims, and has thereby failed to establish a *prima facie* case of obviousness. (*KSR,* 550 U.S. at 418 (citing *In re Kahn*, 441 F.3d at 988).) The Examiner states that it would have been obvious to one of ordinary skill in the art at the time of Appellants' invention to combine Perkes and Christian "for the purpose of providing security to the workstations and any devices connected to the network transceiver." (Final Office Action, Feb. 5, 2010, pp. 20-21.) However, this statement is merely a recitation of an object of an individual reference (*see* Christian, 2:28-41), rather than an articulated reason with rational underpinnings of why it would have been obvious to one skilled in the art to combine the applied references to arrive at any of Appellants' claims. Moreover, Appellants do not understand how the Examiner's stated motivation applies to Appellants' invention at all. For example, Appellants' claims do not recite "providing security to the workstations and any devices connected to the network transceiver," as stated by the Examiner.

Furthermore, the Examiner does not offer any reason for combining Christian with Liwerant or Fleming. Accordingly, the Examiner's single statement does not offer a coherent rationale as to why one would combine all four applied references in a manner that would arrive at Appellants' claims. For at least these reasons, the Examiner has failed to establish a *prima facie* case of obviousness.

d. There is no apparent reason to combine Perkes, Liwerant, Fleming, and Christian, and therefore their combination is incapable of supporting any proper rejection under 35 U.S.C. § 103(a)

Not only has the Examiner failed to show that there is a rational apparent reason to combine Perkes, Liwerant, Fleming, and Christian to arrive at any of Appellants'

claims, after careful review of the applied references, Appellants are not aware of such an apparent reason.

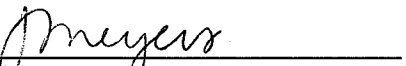
VIII. CONCLUSION

Each of claims 1-5, 7, 8, 37-41, and 43-57 has been improperly rejected, both (a) in that the Examiner has failed to provide cited references that disclose all of the elements of these claims, and (b) in that the applied references would not support any proper rejection of these claims. Accordingly, Appellants seek the reversal of the rejection of claims 1-5, 7, 8, 37-41, and 43-57.

Please charge any deficiency in fees or credit any overpayment to our Deposit Account No. 50-0665, under Order No. 320529154US from which the undersigned is authorized to draw.

Dated: July 2, 2010

Respectfully submitted,

By 

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CLAIMS APPENDIX

Claims Involved in the Appeal of Application Serial No. 10/675,925

1. A method of using a distribution system for distributing images to client systems, the method comprising:

tracking communications received at the distribution system from a client system via a communications link, wherein a communication received from the client system includes a time associated with the communication; and

for an image that is to be distributed by the distribution system to a client system,

determining whether a time associated with a most recently received communication from the client system is within a certain time period;

if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link; and

if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link.

2. The method of claim 1 wherein the communications link is the Internet.

3. The method of claim 1 wherein the mechanism other than the communications link comprises a physical computer-readable medium.

4. The method of claim 3 wherein the computer-readable medium comprises a disc-based medium.

5. The method of claim 3 further comprising if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, recording the image on the computer-readable medium.

6. (Canceled)

7. The method of claim 1 wherein if the sending of the image to the client system via the communications link fails, sending the image to the client system via a mechanism other than the communications link.

8. The method of claim 1 wherein the communication received from the client system is a heartbeat that is sent periodically to the distribution system by the client system.

9–36. (Canceled)

37. An image distribution computing system having a processor and memory, comprising:

a component that receives via a communications link communications from client systems;

a component that provides packages of images to be distributed to client systems;

a component that determines, for a package of images that is to be distributed to a client system, whether the package of images should be distributed to the client system via the communications link or via a mechanism other than the communications link based on when the client system last communicated with the image distribution computing system via the communications link; and

a component that directs the distribution of a package of images to a client system in accordance with the determination,

wherein the components are implemented as instructions stored in the memory for execution by the processor.

38. The system of claim 37 wherein the communications link is the Internet.

39. The system of claim 37 wherein the mechanism is a physical computer-readable medium.

40. The system of claim 39 wherein the computer-readable medium is a disc-based medium.

41. The system of claim 39 including a component that records the package of images on the computer-readable medium.

42. (Canceled)

43. The system of claim 37 wherein the communications received from the client systems include heartbeat communications.

44. The system of claim 37 including a component that sends via the communications link the package of images to the client system.

45. The system of claim 37 wherein each package of images includes images selected based on preferences for the client system to which the package is to be sent.

46. A method in a computer system for distribution of images to a client system, the method comprising:

receiving via the Internet heartbeat communications from a client system, the heartbeat communications being HTTP requests;

recording an indication of receipt of the heartbeat communications from the client system;

determining whether an image is to be sent to the client system via the Internet or via some other mechanism based on heartbeat communications received from the client system as indicated by the recorded indications of the receipt of heartbeat communications; and

sending the image to the client system via the Internet or via some other mechanism based on the determination.

47. The method of claim 46 wherein the mechanism is a physical computer-readable medium.

48. The method of claim 47 wherein the computer-readable medium is a disc-based medium.

49. The method of claim 47 including recording the image on the computer-readable medium.

50. The method of claim 46 wherein the determination is made based on when the client system last sent a communication via the Internet.

51. The method of claim 46 including sending via the Internet the image to the client system.

52. The method of claim 1 wherein the communication received from the client system is transmitted at the initiative of the client system.

53. The system of claim 37 wherein the communication received from the client system is transmitted at the initiative of the client system.

54. The method of claim 46 wherein the heartbeat communications received from the client system are transmitted at the initiative of the client system.

55. A computer-readable medium having stored thereon computer-executable instructions that, if executed by a computing system, cause the computing system to perform a method comprising:

tracking communications received at the computing system from a client system via a communications link, wherein a communication received from the client system includes a time associated with the communication; and

for an image that is to be distributed by the computing system to a client system,

determining whether a time associated with a most recently received communication from the client system is within a certain time period;

if it is determined that the time associated with the most recently received communication from the client system is within the certain time period, sending the image to the client system via the communications link; and

if it is determined that the time associated with the most recently received communication from the client system is not within the certain time period, sending the image to the client system via a mechanism other than the communications link.

56. The computer-readable medium of claim 55 wherein the communication received from the client system is transmitted at the initiative of the client system.

57. The computer-readable medium of claim 55 wherein the communication received from the client system is a heartbeat that is sent periodically to the distribution system by the client system.

EVIDENCE APPENDIX

None.

RELATED PROCEEDINGS APPENDIX

None.